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In The

# Supreme Court of the United States

IN RE: GARY A. TAYLOR AND
WILLIAM S. HARRIS,

*Petitioners.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does 21 U.S.C. §848(q) afford federal habeas corpus petitioners, who were sentenced to death by state courts, the right to appointed counsel in clemency and competency proceedings?

## LIST OF PARTIES

This petition seeks review of a decision denying the right to appointed counsel and to attorneys' fees in clemency and competency proceedings in two separate but related cases. Petitioner Gary A. Taylor was appointed as counsel for a federal habeas corpus capital petitioner, Jack Wade Clark. Petitioners Taylor and William S. Harris were appointed as counsel for a second federal habeas corpus capital petitioner, Juan Soria. The appointments were pursuant to a federal statute, 21 U.S.C. §848(q). Mr. Clark and Mr. Soria were eventually executed by the State of Texas.

The respondent in both proceedings below was Gary L. Johnson, then the Director of the Texas Department of Criminal Justice, Institutional Division. Pursuant to Supreme Court Rule 35.3, Janie Cockrell, the new Director of the Texas Department of Criminal Justice, Institutional Division, should be substituted in place of her predecessor, Gary L. Johnson. In the proceedings below in *Clark v. Johnson (In re: Taylor)*, Ms. Gena Bunn, Assistant Attorney General for the State of Texas, advised the U.S. Court of Appeals that neither the Texas Department of Criminal Justice, the Office of the Attorney General nor the State of Texas had any interest or role in that appeal.

Though not named as parties below, at the suggestion of the Clerk of this Court, counsel is serving this petition upon the United States Solicitor General and the Clerks of the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgments below. Despite the unequivocal language of a federal statute, the United States Court of Appeals for the Fifth Circuit has held that people sentenced to death by state courts have no right to counsel in clemency and competency proceedings. This Court's review is essential to resolve a split in the circuits and to ensure that all individuals sentenced to death have a meaningful opportunity to seek clemency and to have a court determine whether they are competent to be executed.

This petition seeks review of two separate judgments that involve identical or closely related questions within the meaning of Supreme Court Rule 12.4.

## OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fifth Circuit in *Clark v. Johnson (In re: Taylor)* is Appendix A to the petition (App. 1a, *infra*) and is reported at 278 F.3d 459 (5th Cir. 2002). The unpublished decision of the United States District Court is Appendix C to the petition (App. 11a, *infra*).

The unpublished order of the United States Court of Appeals for the Fifth Circuit in *Soria v. Johnson (In re: Harris and Taylor)* is Appendix B to the petition (App. 9a, *infra*). The unpublished decision of the United States

District Court is Appendix D to the petition (App. 13a, *infra*).

## JURISDICTION

In *Clark v. Johnson (In re: Taylor)*, the district court entered its order on April 6, 2001. *See* App. 11a. On January 2, 2002, the United States Court of Appeals for the Fifth Circuit affirmed in a published opinion, finding jurisdiction to review the ruling as either a final order or as an appealable collateral order. *See* App. 1a. A petition for rehearing en banc was denied on January 28, 2002. *See* App. 16a. In *Soria v. Johnson (In re: Harris and Taylor)*, the district court entered its order on April 9, 2001. *See* App. 13a-14a. On July 23, 2001, the United States Court of Appeals for the Fifth Circuit dismissed the petitioner's appeal for lack of jurisdiction. *See* App. 10a. On January 28, 2002, the court of appeals granted rehearing on the basis of *Clark*, vacated its earlier order of dismissal and affirmed the district court. *See* App. 16a.

In both cases, the district court had jurisdiction over the appointment and compensation of counsel pursuant to 21 U.S.C. §848(q) and had jurisdiction over the federal habeas corpus petition pursuant to 28 U.S.C. §2254(a). The court of appeals had jurisdiction pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## RELEVANT STATUTORY PROVISIONS

Relevant portions of 21 U.S.C. §848(q) are reprinted as Appendix F, *infra*, at App. 18a.

## STATEMENT OF THE CASE

1. ***Clark v. Johnson (In re: Taylor)***

Jack Wade Clark was convicted of capital murder in 1991 and was sentenced to death. *See* App. 1a. After the state post-conviction proceedings concluded, the United States District Court appointed petitioner Gary A. Taylor to represent Mr. Clark, pursuant to 21 U.S.C. §848(q). *See id.*

Mr. Taylor filed a habeas corpus petition in the district court, which was denied. *See id.* Section 848(q)(8) provides that an attorney appointed in a capital federal habeas corpus case "*shall* represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . appeals [and] applications for writ of certiorari . . . ." *Id.* (emphasis added). Counsel sought to appeal on behalf of Mr. Clark to the United States Court of Appeals for the Fifth Circuit, which denied a certificate of appealability. *See Clark v. Johnson*, 202 F.3d 760 (5th Cir. 2000). Mr. Taylor petitioned for a writ of certiorari, which was denied on October 2, 2000. *See Clark v. Johnson*, 531 U.S. 831 (2000).

Section 848(q)(8) additionally commands that federally-appointed habeas counsel "*shall* . . . also represent

the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." *Id.* (emphasis added). Mr. Taylor submitted a clemency application on behalf of Mr. Clark to the Texas Board of Pardons and Paroles and sought a reprieve from the Governor of Texas. *See* App. 21a. As part of the clemency process, counsel complied with several requests for information from the Texas Board of Pardons and Paroles and reached an agreement with the Lubbock County District Attorney to perform DNA testing. *See id.* Mr. Taylor's efforts ended on January 9, 2001, when the Board denied clemency, Governor Perry turned down the request for a reprieve and Mr. Clark was executed. *See* App. 22a.

On February 13, 2001, Mr. Taylor submitted his voucher and timesheets to the district court, seeking compensation and reimbursement of expenses for his efforts to secure clemency for Mr. Clark. *See* App. 2a, 21a. Mr. Taylor received no funds from any source for the clemency representation (*see* App. 22a), as the State of Texas does not provide for the appointment of counsel for clemency proceedings. On April 6, 2001, the federal district court issued an order denying compensation, citing a March 2001 decision from another district, *Chambers v. Johnson*, 133 F. Supp. 2d 931 (E.D. Tex. 2001). *See* App. 11a. *Chambers* holds that an appointment of counsel under §848(q) does not include state clemency representation. *See id.*, 133 F. Supp. 2d at 934-36.

Mr. Taylor appealed. The United States Court of Appeals for the Fifth Circuit affirmed in a published opinion, holding that an appointment under §848(q) does not encompass state clemency proceedings. *See* App. 8a.

Deciding the case without argument, the court recognized that this was a case of first impression in the Fifth Circuit, but noted that the Circuit "has continued to construe §848(q)(4)(B) narrowly." App. 7a (citing *Cantu-Tzin v. Johnson*, 162 F.3d 295, 298-99 (5th Cir. 1998)). The panel concluded "that the phrase 'proceedings for executive or other clemency as may be available to the defendants' as it appears in §848(q)(8) does not apply to state clemency proceedings." App. 8a. The court failed to cite or address the contrary decision from the Eighth Circuit, *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993), or the published district court decisions that follow *Hill*. *See* App. 8a.

Mr. Taylor sought rehearing en banc, which was denied on January 28, 2002. *See* App. 16a.

2. ***Soria v. Johnson (In re: Harris and Taylor)***

Juan Soria was convicted of capital murder and was sentenced to death. On December 17, 1998, the United States District Court appointed petitioners Gary A. Taylor and William S. Harris to represent Mr. Soria, pursuant to 21 U.S.C. §848(q). *See* App. 26a.

Mr. Taylor and Mr. Harris filed a federal petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, which was denied by the district court on March 25, 1999. *See* App. 26a. The court of appeals denied a certificate of appealability on March 16, 2000. *See Soria v. Johnson*, 207 F.3d 232 (5th Cir. 2000). On June 14, 2000, counsel filed a petition for a writ of certiorari and a motion for stay of execution with this Court. *See* App. 26a. In the meanwhile, the state obtained an execution date of July 26, 2000. *See* App. 27a.

Counsel prepared an extensive application for clemency to the Texas Board of Pardons and Paroles, which included a psychological assessment. *See id.* Mr. Soria had deteriorated mentally in the year and a half prior to his scheduled execution. He was repeatedly transferred from Texas's death row to the psychiatric unit of a prison in Richmond, Texas. *See id.* As the execution date approached, Mr. Soria had more than 100 different self-inflicted wounds on his body. *See id.* Counsel obtained Mr. Soria's medical files and sought to have him evaluated by an expert, Dr. Richard C. Schmitt, so that information about Mr. Soria's significant mental illness could be included in the clemency application. *See id.* Dr. Schmitt reviewed the records but was unable to meet with Mr. Soria due to a prison transfer. *See* App. 27a-28a. The clemency application was filed on July 5, 2000, and was denied. *See id.*

As they prepared the clemency application, counsel believed that Mr. Soria was competent to be executed. *See id.* The State of Texas apparently had some concerns about his competency and, on July 17, 2000, prosecutors filed a motion with the state court to have Mr. Soria examined by a psychologist. *See* App. 28a. On July 19, 2000, a hearing was held on the motion, and Mr. Harris agreed to the evaluation. *See id.* Co-counsel, Mr. Taylor, then traveled to the prison and met with Mr. Soria, who agreed to cooperate with both the state's expert and Dr. Schmitt. *See id.* Counsel also discussed the upcoming execution with Mr. Soria and was still of the opinion that Mr. Soria was competent to be executed. *See id.* Afterwards, however, Mr. Soria refused to cooperate with

either psychologist and no evaluation was conducted. *See id.*

Shortly thereafter, Mr. Soria's sister informed counsel that Mr. Soria had deteriorated further and she asked that another attempt be made to have Dr. Schmitt examine him. *See id.* On July 25, Mr. Harris and Dr. Schmitt saw Mr. Soria, who was covered with razor cuts. *See* App. 29a. Following an interview, Dr. Schmitt concluded that Mr. Soria was not mentally competent to be executed. *See id.* That same day, this Court denied Mr. Soria's application for a stay of execution and petition for a writ of certiorari in his habeas corpus case, with two justices dissenting from the denial of the stay. *See Soria v. Johnson*, 530 U.S. 1286 (2000).

A motion to determine competency to be executed was filed in state court the next morning, July 26, 2000, and pleadings were filed with the Texas Court of Criminal Appeals, the U.S. Court of Appeals for the Fifth Circuit, and this Court. *See* App. 29a. Relief was denied and Mr. Soria was executed that evening. *See id.*; *In re Soria*, 530 U.S. 1287 (2000).

Pursuant to §848(q), Mr. Harris and Mr. Taylor each sought compensation from the district court for the clemency and competency representation. The district court authorized payment to Mr. Harris. *See* App. 13a-14a. Mr. Taylor submitted his own voucher. *See* App. 14a. On November 3, 2000, the district court *sua sponte* ordered Mr. Harris to show cause why the court should not vacate its previous approval of his fees, and ordered Mr. Taylor to show cause why the court should not disapprove his voucher. *See* App. 13a. Counsel filed their response, with

details of their clemency and competency representation, and explained that §848(q) requires appointed counsel to continue to represent their client in all available clemency and competency proceedings. *See* App. 25a-32a. They pointed out that the State of Texas does not provide funds for clemency or competency representation. *See* App. 30a. On April 9, 2001, the district court issued an order denying compensation to Mr. Taylor, vacating the prior payment to Mr. Harris, and ordering Mr. Harris to refund his fees. *See* App. 14a. The court characterized all of the work as state clemency representation and found that, as a matter of law, it was not part of an appointment under §848(q), citing *Chambers*. *See* App. 13a-14a.

Petitioners appealed this ruling. On July 23, 2001, the court of appeals dismissed the appeal for lack of jurisdiction. *See* App. 10a. On January 28, 2002, however, the panel granted rehearing, vacated the order of dismissal, and affirmed the district court. Applying the circuit's earlier ruling in *Clark*, the panel ruled as a matter of law that §848(q) does not authorize state clemency and competency representation. *See* App. 10a. As in *Clark*, the panel failed to acknowledge the Eighth Circuit's contrary holding in *Hill*.

## REASONS FOR GRANTING THE PETITION

**1. The Fifth Circuit's erroneous interpretation of 21 U.S.C. §848(q) conflicts with the ruling of the Eighth Circuit and several district courts.**

**a. Section 848(q) plainly requires the appointment of counsel for clemency and competency proceedings.**

In 1988, Congress passed the Anti-Drug Abuse Amendments Act ("ADAA"), Pub. L. 100-690, Title VII, §7001, 102 Stat. 4393-94, which establishes a right to counsel for state death-sentenced prisoners who seek federal habeas corpus review. In addition, the statute plainly provides for counsel in clemency and competency proceedings, which typically arise at the conclusion of the federal habeas corpus litigation. Congress made clear that people sentenced to death should not be abandoned by their lawyers as an execution date nears. Thus, contrary to the Fifth Circuit's view, appointed counsel – who are already familiar with the client and the case – must continue their representation.

In construing §848(q), this Court must "begin, as always, with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001) (citations omitted). The 1988 Act added 21 U.S.C. §848(q)(4)(B), which provides,

> "In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in

> accordance with paragraphs (5), (6), (7), (8), and (9)."

The referenced paragraph 8 states, in turn:

> "*Unless replaced by similarly qualified counsel . . . , each attorney so appointed* shall represent the defendant through every subsequent stage of available judicial proceedings, . . . and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, *and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.*"

21 U.S.C. §848(q)(8) (emphasis added). Another paragraph, §848(q)(10)(A), furnishes compensation "to attorneys appointed under this subsection" at a fixed hourly rate. Subsection 848(q)(10)(B) provides expenses for other reasonably necessary services.

Under the plain language of this statute, appointed and compensated counsel must be afforded to a capital habeas corpus petitioner for state clemency representation, and for state and federal competency proceedings. Section 848(q)(4)(B) requires the appointment of counsel in any capital proceeding under §2254 – meaning in any capital federal habeas corpus petition filed by a state prisoner – and in the related proceedings described in §848(q)(8). Section 848(q)(8) provides that, once appointed, the habeas corpus lawyer *shall* represent the capital defendant in such "proceedings for executive or other clemency as may be available to the defendant." This duty must encompass *state* clemency proceedings because

the statutory right to counsel includes, without limitation, "such" clemency proceedings "as may be available" and the *only* clemency proceedings "available" to a defendant convicted in a state court are those that are provided by the state. Likewise, §848(q)(8) requires that counsel represent the defendant in "such competency proceedings . . . as may be available. . . . " The statute does not limit this right to counsel to proceedings in a federal forum. Indeed, whether a person is competent to be executed may involve issues of both state and federal law and the federal issues must, in most instances, first be presented to the state courts. *See* 28 U.S.C. §2254(b)(1).

Where, as here, the language of the statute is clear, that language must control. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, the Eighth Circuit correctly ruled in *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993) that "[t]he plain language of §848(q) evidences a congressional intent to insure that indigent state petitioners receive 'reasonably necessary' competency and clemency services from appointed, compensated counsel." *Id.* at 803.

There are other reasons why the Eighth Circuit was correct. The statute expressly refers to "proceedings for executive or *other* clemency . . . ." §848(q)(8) (emphasis added). Federal clemency is purely executive.[1] But a

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[1] *See* U.S. CONST., art. II, §2, cl. 1. The federal clemency power is not even subject to modification by the legislative branch. *See Schick v. Reed*, 419 U.S. 256, 266 (1974); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

number of states have forms of clemency that are "other" than executive. Chief Justice Rehnquist has noted that "[t]he original States were reluctant to vest the clemency power in the executive." *Herrera v. Collins*, 506 U.S. 390, 414 (1993). Although the clemency power "has gravitated toward the executive over time" (*id.*), a number of states permit the legislative or judicial branches to control or participate in the clemency process.[2] The inclusion of the phrase "other clemency" plainly shows that Congress intended §848(q) to include state clemency proceedings. Courts must "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (citation omitted). Moreover, limiting the statute to federal clemency would make the word "other" superfluous. A court must "give effect, if possible, to every clause and word of a statute." *Duncan*, 533 U.S. at 174 (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (internal quotations omitted)); *(Terry) Williams v. Taylor*, 529 U.S. 362, 404 (2000) (same).

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[2] A single example may suffice. In Connecticut, the clemency power is reposed in the legislative, rather than the executive, branch. As that state's highest court has recognized, "[i]n Connecticut, the pardoning power is vested in the legislature . . . which has delegated its exercise to the board of pardons." *McLaughlin v. Bronson*, 537 A.2d 1004, 1006-07 (Conn. 1988) (citations omitted).

**b. The circuits are split.**

The erroneous rulings of the Fifth Circuit directly conflict with decisions from the Eighth Circuit and several district courts. This Court should grant review to resolve the split in authority.

As already noted, in *Hill v. Lockhart*, the Eighth Circuit found that the plain language of §848(q) affords clemency and competency counsel to state prisoners sentenced to death. *See Hill*, 992 F.2d at 803. Although that circuit would require counsel to follow certain procedural steps,[3] the opinion can only be read to hold that §848(q)

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[3] The court noted that for counsel's services to be considered "reasonably necessary," the district court must be satisfied that the underlying federal habeas proceeding is non-frivolous and that state law provides no funds for clemency or competency representation. Counsel should also seek permission prior to beginning the work. In discussing what services are "reasonably necessary," *Hill* drew from the language of former §848(q)(10), which provided:

> "Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9)."

*See* ADAA, Pub. L. 100-690, Title VII, §7001, 102 Stat. 4394. However, after *Hill* was decided, §§848(q)(9) and (10) were amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132, which created §§848(q)(10)(A) and (B), splitting the provisions for counsel from the provisions for

establishes the right to appointed counsel in clemency and competency proceedings, even when those proceedings are convened under the authority of the state. Two district courts outside of Texas have acknowledged the split and have followed *Hill*. *See Lowery v. Anderson*, 138 F. Supp. 2d 1123, 1125 (S.D. Ind. 2001) (granting a motion for appointment of counsel for state clemency representation, finding "the plain language of §848(q)(8) to be controlling here, consistent with the straightforward and persuasive reasoning of the Eighth Circuit in *Hill*."); *Strickler v. Greene*, 57 F. Supp. 2d 313, 316 (E.D. Va. 1999) (concluding that *Hill* is "the better-reasoned appellate decision on this topic" and agreeing that "the statutory text authorizes compensation" for clemency representation.) Further, though it is not a judicial decision, the Fourth Circuit affirmatively instructs appointed capital habeas corpus counsel that it compensates for "all time spent representing the client on appeal, after filing of the notice through preparation for writ of certiorari, and completion of any applicable clemency proceedings." *Payment of Court-Appointed Counsel in Appeals Arising Out of State Capital Convictions*, available at: http://www.ca4.uscourts.gov (last visited April 11, 2002).

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"investigative, expert, and other reasonably necessary services." The current version of §§848(q)(10)(A) and (B) is reproduced, *infra*, at App. 19a-20a. Under the amended statute, it is clear that the "reasonably necessary" limitation applies only to the "investigative, expert and other" services specified in §848(q)(9) and (q)(10)(B). The limitation no longer applies to compensation for the lawyer's time, which is now addressed separately in §848(q)(10)(A).

The Fifth Circuit reached the opposite conclusion. Instead of following the plain language of the statute, the court in *Clark* decided that §848(q)(4)(B) should be construed narrowly. *See* App. 7a. The *Clark* panel revisited an earlier Fifth Circuit case, *Sterling v. Scott*, 57 F.3d 451 (5th Cir. 1995), which held that §848(q) does not provide for the appointment of counsel to return to state court to raise unexhausted claims. Although *Sterling* did not involve the precise question in *Clark*, the panel found *Sterling*'s narrow reading of §848(q) "instructive." *See* App. 7a. It concluded that §848(q)(8) "does not apply to state clemency proceedings." App. 8a. For its part, the court of appeals in *Soria* acknowledged that before it was the question of representation in competency as well as clemency proceedings. *See* App. 10a. Nevertheless, the panel determined that it was bound by *Clark* and simply affirmed the district court, without distinguishing competency from clemency representation. *See id.*[4]

In addition to the Fifth and the Eighth Circuits, the Eleventh Circuit *may* have determined that §848(q) does not require the appointment of federal counsel to raise an unexhausted competency claim in state court. *See In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989). The holding in *Lindsey* is not entirely clear because that court first ruled

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[4] The panel could have, for example, ruled that counsel should be compensated for their federal court efforts involving competency. Two circuits (including the Fifth) have found that §848(q) provides the right to counsel for federal (not state) successor petitions involving competency to be executed. *See Weeks v. Jones*, 100 F.3d 124, 128 (11th Cir. 1996); *Barnard v. Collins*, 13 F.3d 871, 878-79 (5th Cir.), *cert. denied*, 510 U.S. 1102 (1994).

that no properly filed habeas corpus petition was before the federal court, and thus no right to federally-appointed counsel under §848(q) could have attached at all. *See id.* at 1506. Even so, the *Lindsey* court went on to declare that it could not agree that " 'competency proceedings and proceedings for executive or other clemency,' as used in subsection 848(q)(8), encompass . . . any proceedings convened under the authority of a State." *Id.*

In sum, there is no doubt that the Fifth and the Eighth Circuits have reached opposite conclusions about the requirements of §848(q). There is no way to reconcile the two holdings. And although *Lindsey*'s holding is difficult to determine, it appears that the Eleventh Circuit is aligned with the Fifth. The Fourth Circuit has administratively aligned itself with the Eighth, and with district courts in Virginia and Indiana.

The split between the Fifth and Eighth Circuits will not be resolved without direction from this Court. On both sides of the divide are jurisdictions that regularly carry out the death penalty, particularly if one also takes into account the rulings of the district courts in Indiana and Virginia and the Eleventh Circuit's decision in *Lindsey*. Here is the tally of the states for which courts have ruled whether death-sentenced prisoners have a right to federally-appointed counsel in state clemency and competency proceedings, together with the number

of people (in parentheses)[5] that these states have executed in the modern, post-*Furman*[6] era:

| *Right to counsel under §848(q)* | *No right to counsel under §848(q)* |
|---|---|
| Virginia (85) | Texas (265) |
| Missouri (57) | Florida (51) |
| Arkansas (24) | Georgia (29) |
| Indiana (9) | Louisiana (26) |
| Nebraska (3) | Alabama (23) |
| | Mississippi (4) |

This list contains eight of the ten states that have executed the most people in the modern era; only Oklahoma (50) and South Carolina (25) are not represented. Thus, there is no reason to wait for the issue to percolate in the lower courts because the most active death penalty jurisdictions have already weighed in. Where Congress has plainly required counsel to be provided for state clemency and competency representation, the availability of federally-appointed counsel ought not depend upon whether a person faces death in Virginia, Missouri or Arkansas, instead of Texas, Florida or Georgia. This Court should grant review and resolve the split in authority.

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[5] *See* Death Penalty Information Center, *Number of Executions By State Since 1976*, available at: http://www.deathpenaltyinfo.org/dpicreg.html (last visited April 19, 2002). The data are current as of April 18, 2002.

[6] *See Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 227 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

**2. The Fifth Circuit's narrow reading of 21 U.S.C. §848(q) runs counter to the principles of *McFarland v. Scott*.**

In *McFarland v. Scott*, 512 U.S. 849 (1994), this Court held that the language and purpose of §848(q)(4)(B) establish that the statutory right to counsel encompasses legal representation in preparing a capital federal habeas corpus petition. *See id.* at 856. Section 848(q) should be construed "in light of its related provisions" to "give[ ] meaning to the statute as a practical matter." *Id.* at 854, 855. Emphasizing the importance of ensuring appointed counsel to indigent defendants in capital proceedings, "Congress' provision of a right to counsel under §848(q)(4)(B) reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.' " *Id.* at 855 (quoting 21 U.S.C. §848(q)(7)). Examining the express language of the statute and informed by these considerations, the Court concluded that a "post conviction proceeding" within the meaning of §848(q)(4)(B) is commenced by filing a motion for appointment of counsel. *See id.* at 856-57. In the cases at bench, however, the circuit ignored the principles set forth in *McFarland* and failed to give practical meaning to the statute.

In *Clark*, the Fifth Circuit – without citing to *McFarland* – applied a self-derived rule that §848(q) must be construed narrowly. *See* App. 7a. But neither *McFarland* nor any circuit decision stands for the proposition that

§848(q), in contrast to all other statutes, must be construed narrowly.[7] Had the Fifth Circuit panel in *Clark* followed *McFarland*, it would have focused on the plain language of §848(q) and sought to give practical meaning to the statute as a whole. The court would have construed §848(q) in light of its purpose, which is to ensure adequate and uninterrupted legal representation for capital defendants in unique and complex proceedings.

Clemency is a critical part of our criminal justice system, and is particularly vital when the state seeks to take a human life. Clemency is "an act of grace" (*United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833)), or an exercise of mercy or justice; it is "the 'fail safe' in our criminal justice system." *Herrera v. Collins*, 506 U.S. 390 at 415 (citation omitted). As a discretionary, fail safe measure, clemency is typically sought "downstream" from state and even federal habeas corpus litigation. It is "traditionally available to capital defendants as a *final* and alternative avenue of relief." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 284 (1998) (Opn. of Rehnquist, C.J.) (emphasis added). The procedures of the Texas Board of

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[7] *Cantu-Tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998), purportedly followed by the court below, does not establish any such general rule. In *Cantu-Tzin*, the Fifth Circuit declined to appoint counsel and stay an execution because the federal habeas corpus petition was filed beyond the limitations period, tolling did not apply, and the petitioner was deliberately dilatory. *See* 162 F.3d at 298-300. Thus said the circuit – over a dissent – no purpose would be served by the appointment. *See id.* But the question in *Cantu-Tzin* was in no way related to that presented here and *Cantu-Tzin* cannot legitimately be read to hold that §848(q) must be narrowly construed, without regard to the statute's plain meaning or purpose.

Pardons and Paroles, for example, set the filing deadline for commutation in reference to the scheduled execution date, and not in reference to the date of conviction. *See* TEX. ADMIN. CODE §143.57(b) (commutation application must be delivered to the Board not later than 21 days before the scheduled execution). Given clemency's function as a fail safe procedure that is generally sought late in the process, clemency representation is logically part of a system of the appointment of counsel for federal habeas corpus and related proceedings.

Likewise, proceedings to determine competency to be executed are also essential to a system that seeks to impose the ultimate sanction. "[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986). As this Court has recognized, "the issue of sanity is properly considered in proximity to the execution." *Herrera*, 506 U.S. at 406; *see also Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (upholding the lower court's ruling that the claim of incompetency to be executed was not a successive habeas corpus petition where the issue was raised earlier but was not then ripe for adjudication). The issue does not typically even arise until federal habeas counsel has already been appointed and has been working with the habeas corpus petitioner.

*Soria* shows why federally-appointed counsel must provide competency representation. Mr. Soria's mental health deteriorated as the execution date neared, and the *state* filed a motion for a psychological evaluation just nine days before the scheduled execution. At that point, only previously-appointed counsel were in a position to

provide legal assistance for Mr. Soria.[8] It would have been wholly improper to force Mr. Soria – who was then seriously mentally ill – to represent himself on the state's motion or, for that matter, to require him to raise and litigate a *Ford* claim on his own in the few days before his scheduled execution. Surely Congress did not intend such an absurd and unconscionable result.

Had the Circuit sought to give meaning to the entire statute, it would have determined that affording counsel for competency and clemency proceedings serves the essential purpose of §848(q). Through the plain language of the statute, Congress affirmed that a defendant should continue to be represented by counsel as an execution date nears. Clemency and competency proceedings are unique and important, requiring highly skilled legal assistance. Clemency applications are often intertwined with the merits of the underlying habeas corpus

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[8] As Mr. Taylor and Mr. Harris told the district court,

> "In clemency and competency matters, counsel is working usually within days and even, as this case, hours of an execution. The factual basis of the claims are more current and must be developed in large part from events and circumstances that have arisen since the habeas process was concluded. Time is of the essence in this situation and, many times, the nature and extent of such representation cannot be anticipated. Such is especially so in circumstances such as the instant case where in the condemned prisoner's mental status deteriorated on an hourly or daily basis."

App. 31a.

litigation,[9] requiring the assistance of counsel who have knowledge of both the "complex nature" of post-conviction practice (*see McFarland*, 512 U.S. at 855; §848(q)(7)) and a command of the facts of the individual case. As *Soria* demonstrates, it is only reasonable and realistic that competency proceedings are handled by counsel who already know the client. A competency challenge may be especially demanding because it requires a coordinated effort in both state and federal courts. However, instead of looking at the plain language of the law, informed by its purpose, the Fifth Circuit set out to interpret §848(q) as narrowly as it could. This construction is counter to the principles of *McFarland*, ignores the purposes of the statute, and ought to be reviewed by this Court.

**3. The issue is exceptionally important.**

The Fifth Circuit's ruling is now the law in capital proceedings that arise in Texas, Mississippi and Louisiana. As the table displayed earlier in the petition (*supra* at 17) demonstrates, all three are death penalty states, though the panel's published opinion would merit review even if it applied solely to Texas. Texas has executed more people than any other state in the post-*Furman* era. It has

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[9] *See, e.g., Herrera v. Collins*, 506 U.S. at 411-12 ("Clemency . . . is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."); *Thompson v. Oklahoma*, 487 U.S. 815, 876 (1988) (Scalia, J., joined by Rehnquist, C.J., and White, J.) ("The Governor of Oklahoma, who can certainly recognize a frustration of the will of the citizens of Oklahoma more readily than we, would certainly have used his pardon power if there was some mistake here.")

put 265 individuals to death, fully one-third of all executions in the United States since 1976.[10] Texas has already administered lethal injections to nine people in the first four months of this year, and it has eleven more executions scheduled between April 30 and June 26.[11]

Without the right to federally-appointed counsel, many indigent people will go to their deaths without seeking clemency, for no other reason than they cannot afford to hire a lawyer to make a final plea for mercy and grace, and indigent but incompetent inmates may be executed. Of the eleven states listed in the table in this petition, only Florida provides a statutory right to counsel in clemency and competency proceedings.[12] Some

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[10] *See Number of Executions By State Since 1976, supra* note 5.

[11] *See* Death Penalty Information Center, *Upcoming Executions*, available at: http://www.deathpenaltyinfo.org/executionalert.html (last visited April 19, 2002).

[12] *See* FLA. STAT. §925.035(4) (providing funds up to $1,000 for clemency representation); FLA. STAT. §925.036; *Remeta v. Florida*, 559 So.2d 1132 (Fla. 1990) (courts have authority to compensate beyond the $1,000 cap); *see also* FLA. STAT. §922.07(1) (requiring appointment of counsel if the Governor is informed that a defendant *may* be incompetent to be executed). Counsel have located no statutes that provide for compensation of counsel in clemency and competency proceedings in the other ten states. In *Strickler v. Greene*, the district court noted that Virginia does not compensate counsel for clemency representation. *See id.*, 57 F. Supp. 2d at 314. The court in *Lowery v. Anderson*, 138 F. Supp. 2d at 1125, made the same observation about Indiana law.

Lawyers in a public defender office or other publicly-funded organization may provide clemency or competency representation pursuant to contract or agreement, but there does not appear to be a right under state law to such

lawyers appointed under §848(q) may prepare clemency applications or petitions raising competency claims *pro bono*, but others will not. Many death row inmates are poorly educated,[13] retarded,[14] mentally ill,[15] or juveniles,[16] wholly unable to marshal the materials necessary to file their own clemency applications or to litigate the

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representation in these other ten states, nor would any such contract or agreement help defendants represented by appointed private counsel.

[13] The U.S. Department of Justice reports that 14.4% of those on death row have an education up to the eighth grade or less. Another 37.3% went beyond eighth grade but failed to graduate from high school. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment 2000*, Tbl. 7 (Dec. 2001), available at: http://www.ojp.usdoj.gov/bjs/abstract/cp00.htm (last visited April 19, 2002).

[14] *See* The Constitution Project, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY, at 12 (2001) (reporting that persons with mental retardation make up between 12 and 20 percent of those on death row).

[15] *See* Dorothy O. Lewis, et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 840 (1986) (finding, in a study of fifteen adult death row inmates, that 40% (six) were chronically psychotic, evidencing symptoms such as loose, illogical thought processes, delusions and hallucinations); Nat'l Mental Health Assoc., *Death Penalty and People With Mental Illness*, available at: http://www.mha-mi.org/policy44.html (last visited April 19, 2002) (estimating that between 5 and 10 percent of people on death row have a serious mental illness).

[16] Seventy-eight defendants who were seventeen years or younger at the time of the crime are now serving death sentences in the United States. *See Capital Punishment 2000, supra* note 13, Tbl. 8. Their entry into the criminal justice system at a young age limits their education, development and access to resources.

question of their own competency to be executed. They will be executed without clemency or competency review.

We do not have to speculate to know that this is true.

Emerson Edward Rudd was represented by counsel appointed under §848(q). After his federal habeas corpus petition was denied and this Court denied certiorari, his counsel asked to clarify that his order of appointment included state clemency representation. The district court ruled that §848(q) does not provide compensation for state clemency applications. *See Rudd v. Johnson*, 2001 U.S. Dist. Lexis 18315 & 18798 (N.D. Tex. 2001). This Court and the Fifth Circuit denied stays of execution. *See Rudd v. Cockrell*, 122 S.Ct. 585 (2001); *Rudd v. Cockrell*, No. 01-11437 (5th Cir. Nov. 14, 2001). Mr. Rudd went to his death on November 15, 2001, without an application for clemency being filed with the Texas Board of Pardons and Paroles.

Likewise, the state courts in Texas denied Jeffrey Caldwell's request for appointment of counsel to assist him in developing his claim of incompetency to be executed. The Court of Criminal Appeals ruled that there is no right to counsel under Texas law, that the burden is on the inmate himself to come forward with a substantial showing of incompetence, and that Caldwell did not make the requisite showing. *See Ex parte Caldwell*, 58 S.W.3d 127, 130-31 (Tex. Crim. App. 2000). Caldwell filed a federal habeas corpus petition raising the *Ford* claim, but the federal district court deferred to the state court's findings and denied relief; the Fifth Circuit denied a

certificate of appealability and refused to stay the execution. *See Caldwell v. Johnson*, 226 F.3d 367, 372-74 (5th Cir. 2000). Mr. Caldwell was executed on August 30, 2000.

Clemency and competency proceedings are critical to a system that imposes the death penalty. Clemency is particularly important given recent additional restrictions on federal habeas corpus.[17] Thus, in *Herrera v. Collins*, this Court rejected a free-standing assertion of actual innocence, but underscored that Mr. Herrera was not "left without a forum to raise his actual innocence claim." *Id.*, 506 U.S. at 411. He could file a state application for clemency, a process "deeply rooted in our Anglo-American tradition of law." *Id.* at 411-12. Indeed there is rich irony in the rulings below. Although the Fifth Circuit held that there is no right to counsel for clemency review, the same court has repeatedly ruled that it is not a violation of the Constitution to execute an innocent Texas death row inmate, pointing out that the person may apply for clemency to the Texas Board of Pardons and Paroles. *See Graham v. Johnson*, 168 F.3d 762, 788 (5th Cir. 1999), *cert. denied*, 529 U.S. 1097 (2000); *Lucas v. Johnson*, 132 F.3d 1069, 1074-76 (5th Cir.), *cert. dismissed*, 524 U.S. 965 (1998). But if clemency is essential to our system of justice, the availability of that remedy must depend upon the merits of the clemency case, rather than upon the

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[17] The AEDPA added a statute of limitations (*see* 28 U.S.C. §2244(d)), restrictions on successive petitions (*see* 28 U.S.C. §2244(b)), and new requirements of deference (*see* 28 U.S.C. §2254(d)). These provisions constrict the opportunity of state prisoners to receive federal habeas corpus relief. For many death-sentenced prisoners, clemency may provide the only available procedure to avoid execution.

utter chance that an indigent inmate will find a volunteer lawyer willing to investigate and file a clemency application in the first place.

Also essential to our system of justice is the principle that we do not execute the mentally incompetent. As this Court said in *Ford v. Wainwright*, the practice of executing a prisoner who has lost his sanity "consistently has been branded 'savage and inhuman.' " *Ford*, 477 U.S. at 407 (quoting 4 W. Blackstone, COMMENTARIES 24-25 (1769)). There are well-established reasons why. The practice offends humanity, does not promote deterrence, fails to serve the purpose of retribution, and does not allow the defendant an opportunity to prepare for his or her death. *Id.* at 407-08 (citations omitted). A person who lacks the capacity to understand the penalty of death or the reasons for its imposition will by definition be incapable of raising and litigating a *Ford* claim. As a dissenting judge pointed out in *Ex parte Caldwell*, "[i]f an applicant is, in fact, incompetent, filing the required motions *pro se* is an impossibility; the applicant will have neither the knowledge of the right nor the means to assert it." *Id.*, 58 S.W.3d at 131 (Johnson, J., dissenting). If Congress's statute is read to eliminate the right to appointed counsel in competency proceedings, incompetent defendants will be executed without any meaningful judicial review.

## CONCLUSION

Petitioners respectfully request that the Court issue a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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**APPENDIX A**

(Filed January 2, 2002)

UNITED STATES COURT OF APPEALS
for the Fifth Circuit.

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No. 01-10573

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JACK WADE CLARK,

Petitioner,

VERSUS

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

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GARY A. TAYLOR,

Appellant.

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Appeal from the United States District Court
For the Northern District of Texas, Lubbock

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Before KING, Chief Judge, and JOLLY and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

The district court granted Gary Taylor's motion to appoint him to represent Jack Wade Clark, a Texas prisoner who had been convicted of capital murder in 1991 and sentenced to death. With Taylor's assistance, Clark filed a 28 U.S.C. §2254 petition, which was denied by the district court. Both the district court and this court denied

Clark a certificate of appealability to appeal the district court's final judgment. Clark's petition to the Supreme Court for a writ of certiorari was also denied. *Clark v. Johnson*, 531 U.S. 831 (2000). The State of Texas executed Clark on January 9, 2001.

Following Clark's execution, Taylor submitted a CJA[1] voucher to the district court requesting compensation and reimbursement of expenses incurred in connection with a state clemency proceeding brought on Clark's behalf. The district court denied the voucher, adopting the reasoning set forth in *Chambers v. Johnson*, 133 F.Supp.2d 931 (E.D.Tex.2001), holding that 21 U.S.C. §848(q)(8) (relating to the payment of court appointed counsel in death penalty cases) did not authorize compensation for representation in state clemency proceedings.

Taylor filed a timely notice of appeal to this Court.

This Court ordered the parties to address whether a circuit court has appellate jurisdiction to review the district court's order denying reimbursement for activities by appointed counsel relating to state clemency matters. The State has informed the Court that it does not have any interest or role in this appeal and therefore does not intend to file a brief.

*Appellate Jurisdiction*

This Court must consider, *sua sponte* if necessary, whether appellate jurisdiction exists. *In re Kaiser Aluminum and Chemical Co.*, 214 F.3d 586, 589 (5th Cir.2000), *cert.*

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[1] Criminal Justice Act (CJA).

*denied*, 532 U.S. 919 (2001). As a court of limited jurisdiction, this Court has authority to hear appeals only from "final decisions" under 28 U.S.C. §1291, interlocutory decisions under 28 U.S.C. §1292, non-final judgments certified as final under Federal Rule of Civil Procedure 54(b), or some other non-final order or judgment to which an exception applies. *Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enter., Inc.*, 170 F.3d 536, 538 (5th Cir.1999).

In general, a district court's order is an appealable final decision if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). In addition, the jurisprudential exception known as the collateral-order doctrine permits an appeal of a narrow group of interlocutory orders if the district court's ruling conclusively determines the disputed question, resolves an important issue that is completely separate from the merits, and cannot effectively be reviewed on appeal from a final judgment. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *United States v. Brown*, 218 F.3d 415, 420 (5th Cir.2000), *cert. denied*, 531 U.S. 1111 (2001).

At issue here is the district court's ruling that counsel was not entitled to compensation and reimbursement under §848(q) for expenses incurred in connection with Clark's state clemency proceeding. Whether the court has appellate jurisdiction to consider an appeal from the district court's order denying compensation under §848(q)(4)(B) is a question of first impression in this Court.

Taylor argues that the district court's order is reviewable as either a final order or as an appealable collateral order. We agree. Attorney fee decisions made at or after a final ruling on the merits are ordinarily appealable. *See Campanioni v. Barr*, 962 F.2d 461, 463 (5th Cir.1992); *Shipes v. Trinity Indus., Inc.*, 883 F.2d 339, 344 (5th Cir.1989) (discussing fees in an EEOC case); *Dardar v. Lafourche Realty Co.*, 849 F.2d 955, 959 (5th Cir.1988) (discussing fees in an APA case); *Ruiz v. Estelle*, 609 F.2d 118, 119 (5th Cir.1980) (discussing fees under the Civil Rights Act, 42 U.S.C. §1988). Taylor concedes that some courts have ruled that a district court's decision to reduce compensation under the CJA are non-appealable administrative decisions. Taylor maintains, however, that this case concerns an interpretation of a federal statute by a federal district judge, not an administrative decision about the appropriate amount of fees for an otherwise authorized activity.

On the other hand, the award of fees under §848(q) is not dependent upon the outcome of the case. §848(q)(10). The opposing party (the United States or State) does not receive notice that a fee determination will be made by the judge, and no adversary hearing is required. Nor does §848(q) expressly provide for appellate review.

The instant order fully and finally disposes of Taylor's request for reimbursement, an issue that is separate from the merits of the federal habeas corpus proceeding. The district court necessarily interpreted the meaning of "proceedings for executive or other clemency" under §848(q)(8) to exclude state clemency proceedings. Such a

decision is qualitatively different from approving or disapproving the amount of expenses reasonably and necessarily incurred by counsel as it definitively determines whether such services are compensable under the Act as a matter of law. We conclude therefore that under either theory this Court has appellate jurisdiction as to the district court's order.

*Clemency Proceedings*

Taylor argues that the plain language of §848(q) requires that counsel pursue state clemency proceedings and therefore that the federal court must compensate counsel for this representation.

This Court reviews a district court's interpretation of a federal statute *de novo. United States v. Rasco,* 123 F.3d 222, 226 (5th Cir.1997).

Section 848(q)(4)(B) authorizes the appointment of counsel in any post conviction proceeding under 28 U.S.C. §2254, seeking to vacate or set aside a death sentence, for any indigent defendant. §848(q)(4)(B). "[E]ach attorney so appointed shall represent the defendant through every subsequent stage of available judicial proceedings, . . . and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." §848(q)(8). Compensation

"shall be paid to attorneys appointed under this subsection." §848(q)(10)(A). Subject to certain amount limitations, fees and expenses paid for reasonably necessary, authorized services are also reimbursable. §848(q)(10)(B).

Whether the phrase "proceedings for executive or other clemency as may be available" includes state clemency proceedings for which counsel may be compensated is a question of first impression in this Court.

The Eleventh Circuit has held that an inmate under death sentence who has not exhausted all available state remedies is not proceeding under §2254 so as to be entitled to appointment of attorney under §848(q). *In re Lindsey,* 875 F.2d 1502, 1506-07 (11th Cir.1989) (denying mandamus to compel the appointment of counsel and a psychiatrist). The court explained that "the terms 'subsequent stage[s] of available judicial proceedings' and 'competency proceedings and proceedings for executive or other clemency,' as used in §848(q)(8), do not encompass within their meanings any proceedings convened under the authority of a State." *Id.* at 1506.

This Court favorably cited *Lindsey* in *Sterling v. Scott,* 57 F.3d 451 (5th Cir.1995), in which this Court held that an indigent state death row petitioner had no right to appointed and paid counsel under §848(q)(4)(B) for the purpose of exhausting his state post-conviction claims. *Id.* at 458. The court concluded in *Sterling* that §848(q)(8), which provides for the continued representation by the appointed attorney throughout "every subsequent stage of available judicial proceedings," did not allow counsel to continue his representation for the purpose of exhausting state remedies in state court. *Id.* at 457. The court read

§848(q)(8) in light of §848(q)(4)(B), which provides that the right to counsel applies only in connection with federal proceedings. *Id.* The court specifically agreed with *Lindsey* "that allowing the defendant to obtain federally appointed counsel for use in state postconviction habeas proceedings would have the effect of supplanting state-court systems for the appointment of counsel in collateral review cases." *Id.* at 458 (internal quotation and citation omitted).

In *Chambers v. Johnson*, the Eastern District of Texas followed the analysis in *Sterling* and *Lindsey* in denying counsel's claim for compensation and reimbursement for representing the petitioner in his state clemency proceedings. *Chambers*, 133 F.Supp.2d at 935-36. The district court below relied upon *Chambers* in denying counsel's claim for compensation and reimbursement.

Taylor argues that *Chambers* misapplies *Sterling* because clemency proceedings are fundamentally different from state post-conviction proceedings raising unexhausted claims. Taylor notes that clemency proceedings are not "judicial proceedings" and thus "wholly different from state *judicial* post-conviction proceedings."

As Taylor correctly argues *Sterling* does not address the precise question presented here, *i.e.*, whether representation in state clemency proceedings is required and compensable. The *Sterling* court's discussion of §848(q), and its reasons for not reading §848(q) broadly, are nevertheless instructive. The court has continued to construe §848(q)(4)(B) narrowly. *See Cantu-Tzin v. Johnson*, 162 F.3d 295, 298-99 (5th Cir.1998) (denying petitioner's request for the appointment of counsel under §848(q)(4)(B)

because the §2254 petition would have been undeniably time-barred). We conclude therefore that the phrase "proceeding for executive or other clemency as may be available to the defendants" as it appears in §848(q)(8) does not apply to state clemency proceedings. Accordingly, we affirm the Order of the district court.

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**APPENDIX B**

(Filed January 28, 2002)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 01-10575

---

JUAN SORIA,

Petitioner,

versus

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

---

WILLIAM STANLEY HARRIS; GARY A. TAYLOR,

Appellants.

---

Appeal from the United States District Court for the
Northern District of Texas
(4:98-CV-1067)

---

Before EMILIO M. GARZA, DEMOSS, and BENAVIDES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the appellants' motion for reconsideration, treated as a petition for panel rehearing, is GRANTED. Appellants' motion to vacate the order of

July 23, 2001 is GRANTED. The appellants' motion to reinstate the appeal is GRANTED.

In the order of dismissal filed July 23, 2001, this Court found that it had "no jurisdiction to entertain an appeal from the denial of request for compensation under [21 U.S.C.] § 848(q)(8)." The appellants filed a motion for reconsideration, which this Court ordered to remain pending until further notice.

Very recently, this Court issued a published opinion addressing the jurisdictional question at bar. *Clark v. Johnson*, ___F.3d___, 2002 WL 5590 (5th Cir. Jan. 2, 2002) (01-10573). As a question of first impression in this circuit, this Court concluded that we did indeed have appellate jurisdiction to consider an appeal from a district court's order denying compensation under § 848(q)(4)(B). *Id.* at *2. Accordingly, we vacate our prior order of dismissal and reinstate the appeal.

The next question is whether district court [sic] correctly concluded that § 848(q)(8) did not authorize compensation for attorneys in state clemency and competency proceedings. In *Clark*, this Court, construing the statute narrowly, concluded that the "phrase 'proceeding for executive or other clemency as may be available to the defendants' as it appears in § 848(q)(8) does not apply to state clemency proceedings." *Id.* at *4. We are bound by that decision and thus must affirm the district court's order in the instant case.

AFFIRMED.

## APPENDIX C

(Filed April 6, 2001)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

| | | |
|---|---|---|
| JACK WADE CLARK,<br>Petitioner,<br>v.<br>GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,<br>Respondent. | ) | CIVIL ACTION NO. 5:98-CV-165-C |

ORDER

The Court has considered Attorney Gary A. Taylor's request (CJA Voucher dated February 13, 2001) for compensation and reimbursement of expenses in connection with a state executive clemency proceeding sought on behalf of Petitioner, Jack Wade Clark. Adopting the reasoning set forth in *Chambers v. Johnson*, ___F.Supp.2d___, 2001 WL 252811 (E.D. Tex. March 8, 2001), attorney Taylor's claim for compensation and reimbursement or representing Clark in his State clemency proceedings is denied.

SO ORDERED.

Dated April 6, 2001.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

## APPENDIX D

(Filed April 9, 2001)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

| | | |
|---|---|---|
| JUAN SORIA,<br><br>Petitioner,<br><br>V.<br><br>GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,<br><br>Respondent. | ) | CIVIL ACTION<br>NO. 4:98-CV-1067-C |

ORDER

By Order dated November 3, 2000, Attorney Gary A. Taylor was ordered to show cause why his request for attorneys' fees and expenses incurred on behalf of Juan Soria in connection with State executive clemency proceedings should not be denied.

Further, Attorney William S. Harris was ordered to show cause why the Court should not vacate the prior approval of the attorneys' fees and expenses he expended for State clemency proceedings on behalf of Juan Soria and why the Court should not order a refund of any payments made to Attorney Harris for State clemency proceedings.

The Court has considered the Response to Show Cause Order Relating to Attorneys' Fees filed by Attorneys Taylor and Harris. Adopting the reasoning set forth

in *Chambers v. Johnson*, ___F.Supp.2d___, 2001 WL 252811 (E.D. Tex. March 8, 2001), the Court finds:

(1) Attorney Taylor's claim for compensation and reimbursement of expenses for representing Juan Soria in connection with the State clemency proceedings is denied.

(2) Pursuant to the post-audit conducted by this Court of Attorney Harris' CJA 30 voucher submitted on September 14, 2000, the prior approval of fees and expenses in connection with the State clemency proceedings is vacated.

(3) Attorney Harris shall refund attorneys' fees in the amount of $7,600.00 and expenses in the amount of $290.78.

It is, therefore, ORDERED:

(1) Attorney Taylor's claim for compensation and reimbursement of expenses (as shown by CJA 30 Voucher dated October 24, 2000) incurred in connection with his representation of Juan Soria in State clemency proceedings is denied.

(2) The prior approval of Attorney Harris' CJA 30 voucher submitted on September 14, 2000, is vacated, and Attorney Harris shall refund attorneys' fees in the amount of $7,600.00 and expense in the amount of $290.78, for a total of $7,890.78, within ninety (90) days from the date of this Order.

(3) Attorney Harris' refund shall be in the form of a cashier's check or firm check made payable to the Administrative Office of the United States Courts, and shall be delivered to Pam Murphy, Deputy-in-Charge, United States District Clerk's Office, United States Courthouse, 501 West 10th Street, Fort Worth, Texas 76102.

(4) After receipt of the refund from Attorney Harris, the Clerk's Office shall mail the refund check along with a certified copy of this Order to: Administrative Office of the United States Courts, P.O. Box 77062, Washington, D.C. 20013-7062.

SO ORDERED.

Dated April 9, 2001.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

**APPENDIX E**

(Filed January 28, 2002)

UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

---

No. 01-10573

---

JACK WADE CLARK,

Petitioner

v.

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent

---

Gary A. Taylor,

Appellant

---

Appeal from the United States District Court
For the Northern District of Texas, Lubbock

---

ON PETITION FOR REHEARING EN BANC

(Opinion 1/2/02, 5 Cir., ___, ___ F.3d ___)

Before KING, Chief Judge, and JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss, Jr.
United States Circuit Judge

## APPENDIX F

### RELEVANT STATUTORY PROVISIONS

Title 21 U.S.C. §848(q) provides, in pertinent part:

"(4)(B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

* * *

"(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

"(9) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the

sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

"(10)(A) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. Not less than 3 years after April 14, 1996, the Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of Title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

"(10)(B) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration,

and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge."

## APPENDIX G

(Letterhead omitted)

February 13, 2001

Nancy Doherty
United States District Clerk
Attn: Kristy Weinheimer, Deputy in Charge
1205 Texas Avenue
221 George Mahon Federal Building
Lubbock, Texas 79401-4002

RE: Cause No. 98-CV-165-C: *Clark v. Johnson*

Dear Ms Weinheimer:

Please find enclosed my voucher and supporting documentation relating to my representation of Mr. Clark during the state clemency process, which I respectfully request be presented to Judge Cummings for his consideration. I believe the information submitted is self-explanatory, but if you or Judge Cummings have any questions, please do not hesitate to contact me at any time.

As I stated, this claim is for my services which were provided after the denial of the petition for writ of certiorari and in relation to seeking state clemency proceedings. I prepared and delivered a clemency application to the Texas Board of Pardons and Paroles and further sought a 30 day reprieve from Texas Governor Rick Perry. I complied with information requests from the general counsel for the Texas Board of Pardons and Paroles several times. Moreover, I was able to come to an agreement with the Lubbock County District Attorney wherein the evidence against Mr. Clark was submitted for DNA testing, at the State's expense. My representation ended at

approximately 5;00 p.m. on January 9, 2001, when Governor Perry turned down Mr. Clark's request for a reprieve. Mr. Clark was executed shortly after 6:00 p.m. that same day.

Please further inform Judge Cummings that I have received no funds from any source with relation to the services provided and I am not aware of Mr. Clark or anyone else receiving any such funds.

If you have any questions regarding these matters, please do not hesitate to contact me.

Sincerely,

/s/

Gary A. Taylor

GAT

*Board Certified in Criminal Law*
11319 Long Branch Rd.
Austin, Texas 78736

## APPENDIX H

Criminal Justice Act Voucher submitted by Gary A. Taylor to the United States District Court for the Northern District of Texas in *Clark v. Johnson* *(In re: Taylor)*
[accompanying timesheets omitted]

BEST AVAILABLE COPY

CJA 30 (Rev. 3/95)

DEATH PENALTY PROCEEDINGS: APPOINTMENT AND AUTHORITY TO PAY COURT APPOINTED COUNSEL D 29332

| 1. JURISDICTION | 2a. DISTRICT COURT DOCKET NO. | 2b. COURT OF APPEALS DOCKET NO. | 3. FOR (DISTRICT/CIRCUIT) |
|---|---|---|---|
| ☑ DISTRICT COURT 2 ☐ COURT OF APPEALS 3 | 5:98-CV-165-C | 98-41113 | FIFTH CIRCUIT |

| 4. LOC. CODE | 5. CHARGE/OFFENSE (U.S. or other code citation) | 6. CASE CODE |
|---|---|---|
| LAUNO | 28 USC 2254 | ☒ D-1 ☐ D-2 ☐ D-3 ☐ D-4 |

| 7. IN THE CASE OF | 8. PERSON REPRESENTED (Last Name, First Name, Middle Initial) |
|---|---|
| Jack Wade CLARK vs JOHNSON | Jack Wade Clark |

9. PERSON REPRESENTED (Status)
1 ☐ DEFENDANT 2 ☐ HABEAS PETITIONER 3 ☐ APPELLANT 4 ☐ APPELLEE 5 ☒ OTHER CLEMENCY PETITIONER

10. COURT ORDER
O ☒ Appointing Counsel C ☐ Co-Counsel P ☐ Subs. for Panel Atty. F ☐ Subs. for Federal Public or Community Defender R ☐ Subs for Retained Atty.
Name of Prior Attorney: _____ Appt. Date _____ Voucher No. _____

Because the above-named "person represented" has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in item 11, who has been determined to possess the specific qualifications required by law, is appointed to represent this person in this case.

b) The attorney named in block 11 is appointed to serve as: ☒ Lead Counsel ☐ Co-Counsel
Name of Co-Counsel: KEVIN FINE
Appointment Date: _____ Voucher No.: _____

c) If you represented the defendant or petitioner in any prior proceeding, attach a listing of those proceedings and describe your role in each (e.g., lead counsel or co-counsel).

☐ d) Due to the expected length of this case, and the anticipated hardship on counsel in undertaking representation full-time for such a period without compensation, interim payments of compensation are approved pursuant to the attached order.

District Court Order & Appointment
Sig. of Presiding Judicial Officer or by Order of Court (Clerk/Deputy)

6/98
Date of Order

Nunc Pro Tunc Date

| 11. FULL NAME OF ATTORNEY/PAYEE (First Name, M.I., Last Name, Including Suffix) AND MAILING ADDRESS | 13B. SOCIAL SECURITY NO. (Only provide per instructions) | 13C. EMPLOYER I.D. NO. (only provide per instructions) |
|---|---|---|
| GARY A. TAYLOR<br>PO BOX 90212<br>AUSTIN, TX 78709 | 453-29-6835 | |

13D. NAME AND MAILING ADDRESS OF LAW FIRM (Only provide per instructions)

| 12. WORK PHONE | 13A. Does the attorney have the preexisting agreement (see instructions) with a corporation, including a professional corporation? |
|---|---|
| 512 301-5100 | ☐ Yes ☒ No |

## CLAIM FOR SERVICES OR EXPENSES

14. STAGE OF PROCEEDING
Check the box which corresponds to the stage of the proceeding during which the work claimed at Item 15 was performed even if the work is intended to be used in connection with a later stage of the proceeding. CHECK NO MORE THAN ONE BOX. Submit a **separate** voucher for **each** stage of the proceeding.

| CAPITAL PROSECUTION | HABEAS CORPUS | OTHER PROCEEDINGS |
|---|---|---|
| a ☐ Pre-Trial<br>b ☐ Trial<br>c ☐ Sentencing<br>d ☐ Other Post Trial<br>e ☐ Appeal<br>f ☐ Petition for Supreme Court Writ of Certiorari | g ☐ Habeas Petition<br>h ☐ Evidentiary Hearing<br>i ☐ Dispositive Motions<br>j ☐ Appeal<br>k ☐ Petition for Supreme Court Writ of Certiorari | l ☐ [redacted] of Execution<br>m ☐ Appeal of Denial of Stay<br>n ☐ Petition for Writ of Certiorari to Supreme Court Regarding Denial of Stay<br>o ☒ Other (Please attach description of Proceeding) CLEMENCY |

15. HOURS. BY CATEGORY
Indicate the number of hours expended for the following categories of work performed during the stage of proceedings at Item 14:

On a separate sheet, provide a detailed description of the services performed, including the amounts of time spent and the dates on which the services were performed.

| CATEGORIES | HOURS |
|---|---|
| a. In-Court Hearings | 0 |
| b. Interviews and Conferences with Client | 7.80 |
| c. Witness Interviews | — |
| d. Consultation with Investigators & Experts | — |
| e. Obtaining & Reviewing the Court Record | — |
| f. Obtaining and Reviewing Documents and Other Evidence | 3.70 |
| g. Consulting with Resource Center | |
| h. Legal Research and Writing | 14.90 |
| i. Travel | 4.00 |
| j. Other (Please Attach Description of Service) | |

SUBTOTALS:
In Court (a) 0
Out of Court (b thru j) 30.40
x Hourly Rate ($ 125 )

15A. TOTAL AMOUNT CLAIMED:
$ 3800.00

16. EXPENSES

| TRAVEL, LODGING, MEALS ETC. | AMOUNT | OTHER EXPENSES | AMOUNT |
|---|---|---|---|
| Mileage 200 @ .30 = | 60.00 | CERT Record fee | 9.50 |
| | | Copy Charges for Clemency Petition | 111.32 |

16A. TOTAL TRAVEL EXP. $ 60.00
16B. TOTAL OTHER EXP. $ 120.82
17. GRAND TOTAL CLAIMED $ 3980.82

18. CERTIFICATION OF ATTORNEY/PAYEE FOR PERIOD _____ TO _____

F ☒ Final Payment I ☐ Interim Payment No _____
S ☐ Supplemental Payment

If yes, give details on additional sheets. _____

Has compensation and/or reimbursement for work in this case previously been applied for? ☐ YES ☒ NO
Has the person represented paid any money to you, or to your knowledge to anyone else, in connection with the matter for which you were appointed to provide representation? ☐ YES ☒ NO

I swear or affirm the truth or correctness of the above statements.

► _____
SIGNATURE OF ATTORNEY/PAYEE

► 2/13/01
DATE

## APPROVED FOR PAYMENT

| 19. COMPENSATION | 20. TRAVEL EXPENSE | 21. OTHER EXPENSES | 22. TOTAL AMOUNT APPROVED |
|---|---|---|---|
| $ | $ | $ | $ |

| 23. SIGNATURE PRESIDING JUDICIAL OFFICER | 24. DATE | 25. JUDGE CODE |
|---|---|---|
| | | |

## APPENDIX I

(Filed November 22, 2000)

[Page 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

| | | |
|---|---|---|
| JUAN SORIA<br>*Petitioner,* | § | |
| V. | § | CASE NO.<br>4:98-CV-1067-C |
| GARY JOHNSON, Director,<br>Texas Dept. of Criminal Justice,<br>Institutional Division,<br>*Respondent.* | § | |

---

RESPONSE TO SHOW CAUSE ORDER
RELATING TO ATTORNEYS FEES
WITH SUPPORTING BRIEF

---

TO THE HONORABLE SAM R. CUMMINGS, UNITED STATES DISTRICT JUDGE:

William S. Harris and Gary Taylor, Respondents, file this Response to Show Cause Order Relating to Attorney Fees with Supporting Brief.

### Factual Summary

On December 3, 1998, pursuant to the requirements of TEX. CODE CRIM. PROC. ANN., Art. 11.071, §2(e) Respondent Harris filed a Motion and Brief for Appointment of Counsel. In this motion, Harris, who had represented

Juan Soria in the state habeas proceeding asked the Court to appoint counsel pursuant to 21 U.S.C. §848(q). Because Respondent Harris had several other death penalty cases pending which promised to occupy a substantial part of his time in the then immediate future, he requested the court appoint other counsel for Mr. Soria. The Court responded by appointing both Respondent Harris and Respondent Taylor to represent Soria pursuant to 21 U.S.C. §848(q) on December 17, 1998. Thereafter, as mandated by statute, both [Page 2] Harris and Taylor represented Soria until his execution on July 26, 2000.

A petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254 was filed on Soria's behalf on January 15, 1999. It was heard by the District Court on March 18, 1999, and the petition was denied by the District Court on March 25, 1999. On June 10, 1999, the Court approved payment of fees and costs to Harris totaling $11,127.17. On June 16, 1999, the Court approved fees and costs for Taylor totaling $10,543.39. The total fees and costs paid by the District Court for Soria in 1999 was $21,670.56.

Respondent gave Notice of Appeal to the United States Court of Appeals on April 23, 1999, and after the District Court denied Soria's application for Certificate of Appealability (hereafter COA) filed his Application for COA and Brief with the United States Court of Appeals for the 5th Circuit on September 8, 1999. The 5th Circuit denied COA on March 16, 2000. On June 14, 2000, Respondents filed on Soria's behalf a Petition for Writ of Certiorari and a Motion for Stay of Execution with the United States Supreme Court.

On July 26, 2000, despite prior assurances to Respondent Harris that the State would await outcome of the appeal to the Supreme Court before seeking an execution date, the State sought an execution date without notice to Soria's counsel. The State District Court obliged and set Soria's execution for July 26, 2000. Respondents received notice of this setting on April 14, 2000.

Following the clear mandate of the statute authorizing their appointment, Respondents investigated, prepared and filed a Petition for Clemency with the Texas Board of Pardons and Paroles on July 5, 2000. As a part of the investigation for the clemency petition, Respondents used money provided by Soria's extended family to hire a psychologist to evaluate Soria. This evaluation seemed particularly critical because for approximately a year and a half Soria had [Page 3] been mutilating himself and had been repeatedly transferred from Death Row to Jester IV, the psychiatric unit of the Institutional Division of the Texas Department of Criminal Justice, in Richmond, Texas. It is believed that Soria had more than 100 different self inflicted wounds upon his body during the final period of his incarceration in the TDCJ. Counsel had acquired Soria's voluminous medical file from the prison system and sought to have Soria evaluated because his mental state suggested that clemency should be extended as an act of mercy. Despite his self-mutilation, Soria, in his conversations with counsel appeared to meet the requirements for competency to be executed, and there was no expectation as of July 5, 2000, that a question regarding his competency would be raised. Dr. Schmitt was unable to meet with Soria because he was in the process of being transferred to a hospital unit on the day

Dr. Schmitt traveled to Livingston. That morning he had cut himself again. Dr. Schmitt had to file a report based upon review of Soria's medical records. Clemency was subsequently denied.

On July 17, 2000, the State filed a motion with the state district court to have Soria psychologically examined. Apparently, because of his hospitalizations and the mere fact that Respondents has [sic] sought to have Soria evaluated for the clemency proceeding, the state assumed that a challenge to Soria's competency to be executed was in the offing. On July 19, 2000, a hearing was held on the state's motion with Respondent Harris appearing by telephone from New Mexico where he was on vacation with his family. Harris agreed to the evaluation and informed the state court, for the record, that up to that time there had not been an indication that Soria lacked competency to be executed. Respondent Taylor then traveled to the Jester Unit in Richmond and discussed the agreement and the evaluations with Soria, who agreed to cooperate with both the State's expert, Dr. Randall Price, and the expert hired by Respondents, Dr. Richard C. Schmitt. At the same time, Taylor discussed the upcoming execution with Soria and was of [Page 4] the opinion that Soria met the requirements of competency to be executed. In the end, Soria refused to cooperate with either psychologist and no evaluation was made pursuant to the state court's order.

By July 22, 2000, Harris and Taylor received tearful calls from Soria's sister who maintained that he had deteriorated mentally and pleaded that another attempt be made to have Dr. Schmitt examine him. Harris agreed to travel to Livingston with Dr. Schmitt in a last attempt

to get Soria to talk to Schmitt. Harris hoped that since Soria had known him longer than any other attorney in the case he could persuade Soria to talk to Schmitt. Soria, when seen by Harris and Schmitt on July 25, was covered with numerous razor cuts that he had inflicted on himself. At Harris' urging, he answered Dr. Schmitt's questions. Based on this interview, Dr. Schmitt concluded that Soria did not have the requisite mental competency as defined under TEX. CODE CRIM. PROC. ANN., Art. 46.04 for the execution to proceed. Harris informed the state and Taylor of Schmitt's conclusions by telephone from the Houston Airport. Based on Soria's condition a motion pursuant to Art. 46.04, *Id.*, would be filed the following morning.

The motion to determine competency to be executed was filed on the morning of the execution date, July 26, 2000, and a motion for stay of execution was promptly lodged with the Court of Criminal Appeals, the 5th Circuit, and the United States Supreme Court. The trial court denied relief, as did the Court of Criminal Appeals and the 5th Circuit. Shortly after 5:00 p.m., the United States Supreme Court denied relief with two justices dissenting. Soria was executed at 6:26 p.m. on July 26, 2000.

Respondent Harris and Taylor both sought compensation from the District Court for attorney's fees for services rendered to Juan Soria in applying for Clemency and for litigating his competency to be executed. * * *

[Page 6]

Argument and Legal Authority

* * *

[Page 12]

Respondents can find no statutory authorization for payment of court appointed counsel in clemency proceedings in Texas. The Texas Code of Criminal Procedure creates a right to counsel only in judicial proceedings, TEX. CODE CRIM. PROC. ANN., Art. 1.051. Even this right does not extend to proceedings in state court relating to a condemned persons competency to be executed according to the Texas Court of Criminal Appeals in *Ex parte Caldwell*, 2000 WL 1228848 (Tex.Cr.App. 2000).

Respondents have already pointed out that this court has previously approved attorney's fees in these circumstances. Other Courts in Texas have also done so without prior approval and apparently without reference to presumptive maximum fee limitations. Attached to this response and incorporated for all purposes as exhibits G and H respectively, are the affidavits of Raoul Schonemann and Joe Marguiles. Mr. Schonemann was federally appointed in *Willis Jay Barnes v. Gary L. Johnson*, C.A. No. H-97-400 (S.D. Tex. 1998), a death penalty case in the Southern District of Texas. After representing Mr. Barnes in a habeas proceeding pursuant to 28 U.S.C. §2254, Mr. Schoenemann continued to represent Mr. Barnes in proceedings for executive clemency from the Governor of the State of Texas and the Board of Pardons and Paroles. He did not seek prior approval, but represented Mr. Barnes pursuant to the mandate of the 848(q). He was paid in full for his representation by the district court after being directed by the 5th Circuit to [Page 13] submit his voucher for clemency to the district court.

Similarly, Mr. Joe Marguiles was appointed by the federal District Court for the Eastern District of Texas pursuant to 848(q) in *Betty L. Beets v. Gary L. Johnson*, No. 6:90-CV-575 (E.D. Tex. 1997). He also continued to represent his client during state executive clemency proceedings pursuant to the language of the statute. While he did submit travel expenses for prior approval, he sought no prior approval for his fees. His fees were paid by the District Court in full. This is despite the fact that when added to his fees for the original habeas, they exceeded the presumptive maximum fee.

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In clemency and competency matters, counsel is working usually within days and even, as this case, hours of an execution. The factual basis of the claims are more current and must be developed in large part from events and circumstances that have arisen since the habeas process was concluded. Time is of the essence in this situation and, many times, the nature and extent of such representation cannot be anticipated. Such is especially so in circumstances such as the instant case where in the condemned prisoner's mental status deteriorated on an hourly or daily basis.

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Respectfully submitted,

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